Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K–02–278 OF 2002
GOPAL SRI RAM, ARIFIN JAKA AND AUGUSTINE PAUL JJCA
1 DECEMBER 2004

Land Law — Conveyancing — Option — Terms of option not complied with — Whether parties may give term in option a different meaning than what was stated by subsequent conduct — Whether a binding agreement exists

The vendor ('the respondents') of certain immovable property had granted an option to purchase to the intended purchaser ('the appellants'). The issue pertained to the construction of cl 2 of the option. Clause 2 provided that the intended purchasers agree to enter with a sale and purchase agreement within 45 days of date hereof and to pay the balance sum amounting to a total of 10% of the total purchase price if they decide to exercise the option to purchase the properties. The balance of the 10% was not paid within the 45 days specified in cl 2. However, the appellants did, within the 45 days specified in the option, forward to the respondents' solicitors a draft agreement. At no time throughout the material period when the parties were in communication with each other did the respondents reject the transaction out of hand on the ground that the appellants had not paid the balance of the 10% deposit within the 45 days limited by cl 2. Instead, the respondents' solicitors in its letter dated 12 July 1993 replied that they have no objections to the terms of the draft agreement prepared by the appellants' solicitors and sent by them under cover of their letter dated 17 April 1993.

Held, allowing the appeal and granting specific performance of the terms of the draft agreement:

(1) The parties had by their contemporaneous conduct subsequent to the making of the option agreement placed an interpretation on cl 2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause (see para 4).

(2) It is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto. But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction (see para 5).

(3) Instead of hearkening to the way in which the parties themselves acted towards each other in relation to the meaning of cl 2, the learned judge erred in accepting the invitation of the respondents' counsel to place a

different interpretation on the clause. There was a concluded and binding agreement between the parties in terms of the draft agreement sent under cover of the appellants' solicitors' letter dated 17 April 1993 (see para 6).

[**Bahasa Malaysia summary**

Penjual ('responden-responden') satu harta tak alih telah memberikan satu opsyen membeli kepada pembeli-pembeli ('perayu-perayu'). Isu adalah berhubung dengan pentafsiran klausa 2 opsyen tersebut. Klausa 2 memperuntukkan bahawa pembeli-pembeli bersetuju untuk memasuki satu perjanjian jual beli dalam masa 45 hari dari tarikh tersebut dan untuk membayar baki sejumlah 10% dari harga penuh belian jika mereka mengambil keputusan untuk mengguna pakai opsyen untuk membeli harta tersebut. Baki 10% tersebut tidak dibayar dalam masa 45 hari sebagaimana yang diperuntukkan di dalam klausa 2. Walau bagaimanapun, perayu-perayu, dalam masa 45 hari seperti yang diperuntukkan di dalam opsyen tersebut, mengemukakan kepada peguamcara responden-responden satu draf perjanjian. Sepanjang masa matan di mana kedua-dua pihak berkomunikasi, responden-responden tidak pernah menolak terus transaksi tersebut atas alasan bahawa perayu-perayu tidak membayar baki 10% deposit dalam masa 45 hari seperti mana klausa 2. Sebaliknya, peguam cara responden-responden melalui suratnya bertarikh 12 Julai 1993 menjawab bahawa mereka tidak mempunyai bantahan kepada terma-terma draf perjanjian yang disediakan oleh peguam cara perayu-perayu yang telah dihantar oleh mereka di bawah surat mereka bertarikh 17 April 1993.

Diputuskan, membenarkan rayuan dan memberikan pelaksanaan spesifik terma-terma draf perjanjian:

(1) Pihak-pihak telah melalui perlakuan semasa mereka setelah membuat perjanjian opsyen meletakkan tafsiran klausa 2 yang memberi kesan bahawa bayaran baki 10% tidak akan dibuat dalam masa 45 hari sebagaimana yang diperuntukkan di dalam klausa tersebut (lihat perenggan 4).

(2) Ia merupakan undang-undang muktamad bahawa sesuatu perjanjian tidak boleh ditafsirkan berdasarkan perlakuan pihak-pihak selepas perjanjian dimasuki. Akan tetapi ianya juga muktamad bahawa pihak-pihak boleh melalui tindakan mereka selepas itu memberikan makna tertentu kepada satu terma di dalam perjanjian. Dalam keadaan ini, makna tersebut mengikat mahkamah dan mahkamah tidak berhak untuk mencari makna lain dalam mengguna pakai bidang kuasa tafsirannya (lihat perenggan 5).

(3) Daripada mendengar bagaimana pihak-pihak bertindak di antara mereka berhubung dengan maksud klausa 2, yang arif hakim telah silap kerana menerima jemputan peguamcara responden-responden untuk meletakkan tafsiran yang berbeza kepada klausa tersebut. Terdapat satu perjanjian

yang telah diputuskan dan mengikat di antara pihak-pihak dalam terma-terma draf perjanjian yang dihantar bersama surat peguamcara perayu-perayu bertarikh 17 April 1993 (lihat perenggan 6).]

Notes

For cases on options, see 8(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2333–2351.

Cases referred to

Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce Bank [1982] 1 QB 84 (refd)
American Surety Co of New York v Calgary Mining Co Ltd (1919) 48 DLR 295 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Wickman Machine Tools Sales v L Schuler AG [1974] AC 235 (refd)

Chuah Chong Ewe (Syarikat Ng & Anuar) for the appellants.
R Balabedna (Balabedna & Co) for the respondents.

Appeal from: Civil Suit No 22–62 of 1996 (High Court, Alor Setar)

Gopal Sri Ram JCA (delivering judgment of the court):

[1] We heard this appeal yesterday and at the conclusion of arguments reserved judgment to today. This case concerns the construction to be placed on a clause in an option (exh P2) granted by the intended vendor of certain immovable property to the intended purchaser. The questions of immediate moment are whether the option was properly exercised and whether there is a concluded agreement between the parties to this appeal. The clause in question (cl 2) reads as follows:

> 2 The Intended Purchasers hereby agree to enter with a Sale and Purchase Agreement within 45 days of date hereof and to pay the balance sum amounting to a total of 10% of the total purchase price if they decide to exercise the option to purchase the abovementioned properties.

[2] It is the appellants' case that the aforesaid clause on its true construction means that the sale and purchase agreement contemplated by the clause must be executed and the balance of the 10% deposit referred to therein be paid at the time of such execution. There is no dispute that the balance of the 10% was not paid within the 45 days specified in cl 2. However, according to the chronology of events we were taken through, it is equally beyond challenge that the appellants did, within the 45 days specified in the option, forward to the respondents' solicitors a draft agreement containing terms that may be found in any normal sale and purchase agreement in Malaysian conveyancing practice.

[3] It is also a point of considerable significance that at no time throughout the material period when the parties were in communication with each other did the respondents reject the transaction out of hand on the ground that the appellants had not paid the balance of the 10% deposit within the 45 days limited by cl 2. Instead, we find in the record of appeal provided to us a letter from the respondents' solicitors dated 12 July 1993 in which they say that they have no objections to the terms of the draft agreement prepared by the appellants' solicitors and sent by them under cover of their letter dated 17 April 1993. Now, this was well outside the 45-day period specified in cl 2. That period expired on 23 February 1993.

[4] We therefore have here a situation whereby the parties have by their contemporaneous conduct subsequent to the making of the option agreement have placed an interpretation on cl 2 of exh P2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause. Is it then open to a court to place a different interpretation on cl 2? With respect, we think not.

[5] We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Machine Tools Sales v L Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See *American Surety Co of New York v Calgary Mining Co Ltd* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce Bank* [1982] 1 QB 84; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[6] In our respectful view, this is the error into which the learned judge in the court below fell. Instead of hearkening to the way in which the parties themselves acted towards each other in relation to the meaning of cl 2, he erred in accepting the invitation of the defendants' (respondents before us) counsel to place a different interpretation on the said clause. It follows from what we have said thus far that there was a concluded and binding agreement between the parties in terms of the draft agreement sent under cover of the appellants' solicitors' letter dated 17 April 1993. This is accordingly a case which demands appellate interference.

[7] For the reasons already given, this appeal succeeds and is accordingly allowed. The orders of the High Court are set aside. Specific performance in terms of the draft agreement enclosed with the appellants' solicitors' letter dated 17 April 1993 is hereby decreed. The matter is remitted to the senior assistant registrar of the High Court to enable the parties to settle the terms

of the minutes of the order that is to carry into execution the decree hereby granted. The appellants shall have the costs of this appeal and those incurred in the court below. The deposit is refunded to the appellant.

Appeal allowed.

Reported by Loo Lai Mee